No. 82-1556

In The

# Supreme Court of the United States

October Term, 1982

JOHN DUFFY, the Sheriff of San Diego County, California,

*Petitioner,*

vs.

THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS, SAN DIEGO COUNTY, CALIFORNIA,

*Respondent.*

## BRIEF OF THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the laws and public policy of California, as regards the operation of a money-making gambling business on an Indian Reservation, are criminal and prohibitory in nature or merely civil and regulatory.

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### AUTHORITY TO FILE BRIEF

The County of San Bernardino is a political subdivision of the State of California. This brief is filed pursuant to Rule 36.4 of the Supreme Court Rules.

## INTEREST OF THE COUNTY OF SAN BERNARDINO AS AMICUS CURIAE

The County of San Bernardino is contiguous to Riverside County and but a short distance away from San Diego County. It is deeply concerned that Indians on the four reservations within its boundaries are about to start up gambling operations very similar to the ones in the instant case and in Riverside County. This concern in San Bernardino is heightened by the fact that it is the largest county in the continental United States. As such, it must contend with law enforcement problems over a vastly spread area comprised of rapidly developing desert, mountain and urban communities. The four reservations contain well over 37,000 acres of land in diverse locations throughout the county. One, the San Manuel Reservation, borders the rapidly growing City of San Bernardino. Another, the Twentynine Palms Reservation, is very close to a sizeable military base. The largest, the Chemehuevi Reservation, is in an extremely popular recreational area situated along the Colorado River.

The County of San Bernardino fears the imminent development of large-scale, commercial gambling operations at these various sites and the concomitant law enforcement problems they would create. The County of San Bernardino urges this Court to grant a writ of certiorari in this case to consider whether the decision of the Ninth Circuit Court of Appeals properly determined the nature of California's laws and public policy vis-a-vis federal law regarding this spreading law enforcement problem.

## QUESTION PRESENTED

Whether the laws and public policy of California, as regards the operation of a money-making gambling business on an Indian Reservation, are criminal and prohibitory in nature or merely civil and regulatory.

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## REASONS FOR GRANTING THE WRIT

### California laws and public policy have consistently and continuously prohibited gambling and lotteries, including bingo, notwithstanding the narrow exception accorded charitable bingo.

The crux of the matter in this case is whether California laws, and public policy behind those laws, are criminal and prohibitory in nature so as to make section two of Public Law 280 (Act of August 15, 1983, Pub. L. No. 83-280, 67 Stat. 588, Codified as 18 U. S. C. § 1162) applicable, and California law on the subject enforceable, on Indian Reservations in California.

Shortly after passage of the charitable bingo amendment to the California Constitution, the Attorney General for the State of California had an opportunity to review the history of California law and public policy on lotteries and bingo in this state. [60 Ops. Cal. Atty. Gen. 130 (1977).] The Attorney General explained that California had a long history of absolutely prohibiting lotteries (Id. at 131). Bingo is such a lottery in California (Id.; Report of the Office of the Legislative Counsel of the State of California, Vol. 2 of the Appendix to the Journal of the Assembly of California, 1963, at page 13 of Vol. 27, No. 2 of the Assembly Interim Committee Reports, therein).

The recent enactment of California Penal Code Section 326.5 (Deerings 1975), a very limited exception to the long-standing prohibition against lotteries, did not alter the basic public policy in California of prohibiting gambling as anathema to the public welfare. The Attorney General straightforwardly warned that if the three elements of a lottery are present (i. e., a prize distributed by chance for consideration), one who operates a bingo game outside the strict constraints of this Penal Code section is subject to prosecution under the laws prohibiting lotteries (Id.).

The language of this Attorney General opinion underscores the prohibitory nature of California laws and public policy towards bingo and gambling generally. California seeks to prevent large-scale money-making schemes. In short, unlike some other licensed enterprises or activities which are basically lawful per se, bingo is basically unlawful. *City of Pomona v. Christian Fellowship Center,* 125 Cal. App. 3d 250, 252-53 (1981). "It bears emphasis, . . . that it is very difficult, if not impossible, to devise any scheme, . . ., which will not be in violation of the lottery laws. (citing cases)" 60 Ops. Cal. Atty. Gen. 130, 132 (1977).

A brief look at the California Constitutional provisions relating to lotteries is illuminating. Article IV, Section 19 of the California Constitution reads:

> (a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.
>
> (b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.

> (c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.

The language of the charitable bingo amendment, in subsection (c), refers back to subsection (a) which prohibits lotteries. The most logical interpretation of this wording of the statute is that subsection (c) represents a limited exception to the absolute prohibition on lotteries. Indeed, bingo played outside the strict confines of the statute, drafted pursuant to this provision, is a prohibited lottery, supra. Had the Legislature meant to draft a civil, regulatory subsection, it would have couched the language in subsection (c) parallel to the wording of subsection (b), relating to horse racing. Subsection (c) would have read, "The Legislature may provide for the regulation of bingo games. . . ." It did not do so; such games are basically illegal in California.

**While the Butterworth case is in many respects germane to the instant case, it should not be considered controlling in light of the disparate history regarding gambling laws in California and Florida.**

While the *Butterworth* case, relied upon by the Ninth Circuit Court of Appeals in the instant case, is in many respects germane to this case and provides an outline for relevant discussion, it should not be considered persuasive [*Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310 (5th Cir. 1981), cert. den. 455 U. S. 1020 (1982), cited in *Barona Group of the Capitan Grande Indians v. Duffy*, 694 F. 2d 1185, 1188 (1982)]. Florida's history, both with

respect to Public Law 280 and, moreover, regarding gambling is altogether distinct from California's.

The Fifth Circuit, in the *Butterworth* case, had before it a bingo statute which, in its inception, had *no criminal sanctions* whatsoever and a Florida Supreme Court which had determined that bingo was not a prohibited activity in Florida. [*Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310, 314 (5th Cir. 1981), cert. den. 455 U. S. 1020 (1982)]. That the Fifth Circuit, in its split (2-1) decision barely decided that, under these circumstances, bingo appeared to be merely a regulated activity in Florida, rather than one which is generally prohibited, is not surprising. But, it does not address the status of the law, as shown supra, in California.

**Public Law 280 was drafted primarily to encourage states to combat lawlessness on reservations and to make the Indian population subject to the same state criminal laws as any other citizen.**

Carole Goldberg, in her article entitled "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," 22 UCLA L. Rev. 535, 541, explained that the primary purpose of Public Law 280 was to combat ". . . lawlessness on the reservations. . . ." Originally, California was to be the only state conferred jurisdiction over Reservation Indians (Id. at 540). Ultimately, however, Congress sought the cooperation of all states in this matter of great concern. Only five states, including California, accepted the responsibility when it was first offered (Id. at 537). Florida was not among them (Florida belatedly undertook this task after 1961, Id. at 568). Cali-

fornia, therefore, unlike Florida, has had not only an unswerving commitment to prohibiting gambling but also a firm commitment to enforcing such laws on all its citizens since the inception of Public Law 280.

**Public Law 280, as it relates to enforcement of California's criminal laws throughout the state, is abundantly clear.**

The Ninth Circuit's opinion, in this case, acknowledged the closeness of the question at hand (*Barona* at 1190). The Court strove to find various and sundry doctrines with which it might tip the scales in favor of blocking enforcement of California's laws prohibiting gambling throughout the state. The Court suggested there were ambiguities in the law which should be resolved in favor of the Indians (Id.). But, in reading 18 U. S. C. Section 1162(a) it is hard to find any such ambiguity. It says, simply, that each of the states listed shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed—in California this is, "All Indian country within the State"—to the same extent that such State had jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State. . . . It is difficult to see what is "ambiguous" about this statute.

**If state jurisdiction over reservations is disfavored, Congress would repeal its law which provides for such jurisdiction.**

The Ninth Circuit asserts that State jurisdiction over reservations is disfavored (*Barona* at 1190). If Federal policy truly was to relinquish all control under state law

on activities conducted on Indian land, Congress would have repealed Public Law 280 altogether. It has not done so. There is no way to avoid the fact that California, under Federal law, has jurisdiction on Indian as well as non-Indian land when its prohibitory laws are broken, as here.

## CONCLUSION

The *Barona* case has profound implications. The bingo operation in San Diego is not an isolated situation. It is a spreading problem which is creating substantial law enforcement concerns.

The County of San Bernardino respectfully asserts that the Ninth Circuit Court of Appeals failed to distinguish between the long-standing, unswerving prohibitory nature of California's laws relating to gambling and bingo and Florida's reluctant, piecemeal approach to these matters.

If allowed to stand, this ruling appears to give Indian citizens carte blanche to disregard the penal laws relating to gambling in California.

For these reasons, the County of San Bernardino prays that the Petition for Writ of Certiorari filed by the County of San Diego be granted.

Respectfully submitted,

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